

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

ALSTATE MAINTENANCE, LLC

And

Case No. 29-CA-252004

VERNON HARRIS, an individual

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ**

and

Case No. 29-CB-252635

VERNON HARRIS, an individual

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S
MOTION TO STRIKE POST-HEARING BRIEF**

Pursuant to National Labor Relations Board (“Board”) Rules and Regulations Section 102.24(a), Counsel for the General Counsel hereby opposes the motion (“Motion”) of Respondent Service Employees International Union, Local 32BJ (“Respondent Union”) to strike portions of the General Counsel’s Post-Hearing Brief to the Administrative Law Judge (“ALJ”) in the above-captioned case. As explained below, Respondent Union’s Motion is frivolous and utterly fails to state a basis for the ALJ to strike any portion of the General Counsel’s Post-Hearing Brief. Accordingly, the ALJ should fully consider Counsel for the General Counsel’s entire Post-Hearing Brief in evaluating whether Respondent Union and Respondent Alstate Maintenance, LLC (“Respondent Employer”) have violated the National Labor Relations Act (“Act”) as alleged in the Complaint in this case.

Nothing Contained in the General Counsel’s Post-Hearing Brief Denies the Respondents Due Process

In its Motion, Respondent Union disingenuously argues that Counsel for the General Counsel’s citation to record evidence establishing the duties and responsibilities of the position of Lead Agents is somehow beyond the scope of the allegations of the Complaint and should be stricken, ostensibly to protect the Respondents’ right to “fundamental due process.” However, both Respondents had ample opportunity to object to the admission of this evidence during the hearing yet failed to do so. The record reflects no standing objection by either Respondent

against the admission of evidence relating to Lead Agents other than Harris. Indeed, much of the material in the General Counsel's Brief that Respondent Union seeks to have stricken derives from exhibits that Respondent Union itself introduced as Union or Joint Exhibits, further evidencing the absurdity of Respondent Union's claim that the General Counsel's arguments based on this evidence violates the Respondents' due process.

Without reference to any supporting authority, Respondent Union bizarrely contends that because the Complaint does not assert that any Lead Agent other than Charging Party Vernon Harris is a supervisor under Section 2(11) of the Act, it is – for unexplained reasons – improper for the General Counsel to cite evidence concerning the job duties and responsibilities of Lead Agents in general to prove that Harris possessed supervisory authority. Contrary to Respondent Union's baseless argument, it is undisputed that at all relevant times, Harris held the position of Lead Agent in Respondent Employer's baggage handling operation. Accordingly, it is difficult to conceive in what manner evidence establishing the duties of Lead Agents, in conjunction with the evidence establishing that Harris fulfilled those duties, is improper or prejudicial to Respondents. To the contrary, those facts developed in the record, without any objections from either Respondent, are relevant to the central factual inquiry of whether Harris exercised supervisory authority under the Act. It is axiomatic that evidence showing Lead Agents' supervisory indicia advances the conclusion that Lead Agent Harris possessed such supervisory authority. It is entirely appropriate for the General Counsel to make such an argument to the ALJ, and the General Counsel's Brief highlighting this evidence must not be stricken.

General Counsel's Brief does not, as Respondent Union asserts, "make arguments that are outside the Complaint." The Brief steadfastly focuses on whether Charging Party Harris was a statutory supervisor and underscores the breadth of record evidence affirming that Complaint allegation. Respondent Union's misguided attempt to cleanse from consideration by the ALJ evidence and arguments simply because they are inconvenient or harmful to its case should be easily rejected, and its Motion should be denied.

There is No Basis in Case Law for the Relief Respondent Union Seeks

Respondent's Motion is tellingly devoid of case law in support of the relief it seeks because there is simply no basis for such relief. The sole precedent Respondent Union cites in its Motion, *U.S. Postal Service*, 309 NLRB 13, n. 1 (1992), is inapposite because that case related to a party's attempt to present to the Board certain material that was not part of the administrative record of the case. Here, however, Respondent Union does not contend that portions of the General Counsel's Brief should be stricken because they present facts not included in the record, as the General Counsel's Brief is based entirely on the hearing transcripts and exhibits admitted during the hearing in this proceeding. Instead, Respondent Union moves to strike from the General Counsel's Brief facts and arguments that it does not find helpful to its case. There is no precedent for such an unfounded motion.

Respondent Union's Motion Constitutes a Reply Brief, Which It Is Not Permitted To File Under Board Rules and Regulations

In its desperate effort to persuade the ALJ to disregard or discredit record evidence and arguments raised in Counsel for the General Counsel's Brief, Respondent's Motion amounts to

nothing more than a poorly disguised reply in opposition to the General Counsel's Post-Hearing Brief. Board Rules and Regulations, however, do not permit a party to file post-hearing reply briefs to the administrative law judge. Respondent Union's Motion improperly flouts these Rules and Regulations.

In *Relco Locomotives, Inc.*, the Board affirmed an administrative law judge who deftly dispensed with an improper motion to strike very similar to Respondent Union's Motion here. 359 NLRB 1145, 1177 n. 4 (2013), reaffirmed in 361 NLRB 911 (2014). In *Relco*, counsel for the Acting General Counsel moved to strike portions of the respondent's post-hearing brief simply because counsel for the Acting General Counsel disagreed with certain arguments raised in the respondent's brief based on the respondent's interpretation of the record. *Id.* The administrative law judge appropriately denied the motion to strike and disregarded the arguments raised therein, finding that the motion was "a reply brief labeled as a motion to strike." *Id.* Here too, Respondent Union's Motion is an improper reply brief labeled as a motion to strike, and just as the administrative law judge did in *Relco*, the ALJ here should deny Respondent's Motion and disregard all its assertions.

Conclusion

As set forth above, Respondent's Motion fails to state any basis for the ALJ to strike any portion of the General Counsel's Post-Hearing Brief and constitutes an improper reply brief in contravention of Board Rules and Regulations. Accordingly, the Motion should be denied and its contents disregarded in the ALJ's ultimate disposition of this case.

DATED: October 21, 2020

Respectfully submitted,



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